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No. 03-334

In The
Supreme Court of the United States

SHAFIQ RASUL, ET AL.,
Petitioners,

v.

GEORGE W. BUSH, ET AL.,
Respondents,

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF INTERNATIONAL LAW EXPERT IN SUPPORT OF THE PETITIONERS

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Garcia-Mir v. Meese, 622 F. Supp. 887 (N.D. Ga. 1985), *rev'd in part & aff'd in part & dismissed as moot in part* 788 F.2d.1446 (11th Cir), *cert denied*, 479 U.S. 889 (1986) 6

Grutter v. Lee Bollinger et al., 539 U.S. ___ (2003).....3

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Murray v. Schooner Charming Betsy, 2 CRANCH 64 (1804).....5

Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994).....4

The Paquete Habana, 175 U.S. 677, 700 (1900).....4

Thompson v. Oklahoma, 487 U. S. 815 (1988).....4

Trop v. Dulles, 356 U. S. 86 (1958) 4

INTERNATIONAL JUDICIAL DECISIONS

Armando Alejandro, Jr., Carlos Costa, Mario de la Peña and Pablo Morales v. Cuba, Case No. 11,589 Report No. 86/99 (29 September 1999) and Case No. 10,675, Report No. 51/96, Decision of the Commission as to the Merits (13 March 1997).....13

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) (Judgment on the Merits), 1986 I.C.J. REPORTS 14 .....9, 15

Celiberti de Casariego v. Uruguay, U.N. Hum. Rigts. Comm., Comm. No. R 13/56 (1981), *reprinted in* 2 H.R.L.J. 145 (1981) and 68 I.L.R. 41 (1984).....14-15

Chahal v. the United Kingdom, European Court of Human Rights, Judgment of 15 November 1996, REPORTS OF JUDGMENTS AND DECISIONS 1996-V, p. 1859, §§95–97.....14

Continental Shelf (Libya Arab Jamahiriya v. Malta), 1985 I.C.J. REPORTS 1 9

Cyprus v. Turkey, 15 *E.H.R.R.* 509 (1976).....14

Detainees in Guantánamo Bay, Cuba (Decision on Request for Precautionary Measures), Inter-Am.C.H.R. (Mar. 13, 2002), *reprinted in* 41 I.L.M. 532, 533 (2002) 14

Ireland v. United Kingdom, Judgments of the European Court of Human Rights, Ser. A, No. 25 (18 January 1978) 19

Loizidou v. Turkey (Preliminary Objections) (1995), 20 *E.H.R.R.* 99. *Also see Cyprus* v. *Turkey* (1976) 15 E.H.R.R. 509 14-15

McCann and Others v. United Kingdom, 21 *E.H.R.R.* 97 (1995) 15

Mutombo v. Switzerland, Committee on Torture, Comm. No. 13/1993, UN Doc. A/49/4 at 45 (1994) 14

Saldias de Lopez v. *Uruguay* (1985), Communication No. 52/1979, UN Doc. CCPR/C/OP/1 (views adopted 29 July 1981) 14-15

Soering v. the United Kingdom, European Court of Human Rights, Judgment of 7 July 1989, Ser. A, No. 161 14

Victor Saldaño v. Argentina, U.N. Hum.R.Comm., Report No. 38/99 (11 March 1999) 12

Vilvarajah and Others v. the United Kingdom, European Court of Human Rights, Judgment of 30 October 1991, Ser. A, No. 215 14

FOREIGN JUDICIAL DECISIONS

Capital Cities Communications Inc. v. Canadian Radio-Television Commission [1978] 2 S.C.R. 141 6

Francis v. The Queen [1956] S.C.R. 618 6

Trendex Trading Corporation v. Central Bank of Nigeria [1977] QB 529 (Court of Appeal) 6

Triquet v. Bath (1746) 3 BURR 1478; 97 ER 936 (Court of Kings Bench) 6

West Rand Central Gold Mining Co. v. The King [1905] 2 KB 391 (King's Bench Division) 6

TREATIES

African Charter on Human and Peoples' Rights, *adopted* 27 June 1981, *entered into force* 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 Rev.5 ..... 11-12 18-19

American Convention on Human Rights, *signed 22 November* 1969, *entered into force* 18 July 1978, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979) 4-12 18-19

Charter of the Organization of American States, OAS Treaty Series, Nos. 1-C and 61, U.N.T.S., No. 1609, Vol. 119, entered into force April, 30 1948 11

Charter of the United Nations, 59 STAT. 1033 (1945)....9, 10
16

Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, Council of Europe doc. H(95)7 rev (1995).....11-12
18-19

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, *signed* 4 November 1950, *entered into force* 3 February 1953 11-12
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Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 *U.S.T.* 3316, 75 *U.N.T.S.* 135, *entered into force* 21 October 1950 17

International Covenant of Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976 10-12
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Vienna Convention on the Law of Treaties, U.N.T.S., vol. 1155, p.331, *entered into force* 27 January 1980 5

LAW REVIEWS AND JOURNALS

Ruth Bader Ginsberg & Deborah Jones Merritt, *Affirmative action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999) 4

Françoise Hampson, *Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts*, 31 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 119, 122 (1992).....15

Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53 (1990) 4

Theodore Meron, "Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties," 89 A.J. I.L. 78, 81 (1995).....15

Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348 (2002).....4

Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999).....4

BOOKS

American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).....4, 8

Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (5th ed. 1998) 9

Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, INTERNATIONAL LAW (3rd ed. 1993).....6

PEW Global Attitudes Project, VIEWS OF A CHANGING WORLD (June 2003) 7

Rhona K.M. Smith, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (2003) 19

OTHER MATERIALS

American Declaration of Independence, unanimous declaration of the thirteen United States of America, July 4, 1776 7

American Declaration of the Rights and Duties of Man, O.A.S. Res. XX, *adopted* by the Ninth International Conference of American States (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) 13, 17-19

International Law Commission, Draft articles on the Responsibility of States for Internationally Wrongful Acts, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, U.N. GAOR, 56th Sess. Supp. No. 10 (A/56/10), chp.IV.E.1 (2001) 12

RESERVATIONS, DECLARATIONS, NOTIFICATIONS AND OBJECTIONS RELATING TO THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/2/Rev.4 at 47 *et al* (August 24, 1994) 10

Resolution of Ratification, U.S. Senate, 102nd Congress, 2nd Session Exec. Rept. 102-23 (March 24, 1992 [Legislative Day January 30, 1992]) section II (5), p. 23 10

Rules of the Supreme Court of the United States, *adopted* January 27, 2003, *effective* May 1, 2003 1

United Nations Office of the High Commissioner for Human Rights, *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (in publication, 2003) *accessed at* http://www.unhchr.ch/ html/menu6/2/digest.doc (28 September 2003) 20

Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) 17-19

ACCRONYMS

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
CHRCIS	Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights

INTEREST OF AMICUS CURIAE[1]

International human rights law, although not the subject of detailed argument by any of the parties, is part of the law of the United States and binding on the United States government in the manner described in this Brief *Amicus Curiae*. To ignore international human rights law in this case could have far-reaching adverse consequences for the legitimacy of the rule of law in the United States.

Amicus curiae, Dr. Curtis F.J. Doebbler, represented in this brief has considerable experience and expertise in international human rights law. He has acquired considerable practical experience addressing issues of international human rights law in variety of forums. He holds law degrees with concentrations in international law from New York Law School, Nijmegen University, and a Ph.D. in International Law from the London School of Economics and Political Science. He has lived or worked in more than fifty countries, teaching international law; representing governments, intergovernmental organizations, and non-governmental organizations in forums dealing with international law; writing on international law; advising governments on international human rights law; and representing groups numbering in the million in matters involving international human rights law. He has been a frequent commentator on international law in public forums in Asia, the Middle East and Africa.

Finally, ***amicus curiae*** is a legal representative of prisoners in Guantánamo Bay, Cuba in a case before the

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[1] In accordance with Rule 37.6 it is stated that no monetary contributions were made for the preparation or submission of this brief and that no counsel for any party to this case participated in the authoring of this brief.

Inter-American Commission on Human Rights. The ruling of the United States Court of Appeals for the District of Columbia that is challenged in this case concerns the basic human rights of prisoners in Guantánamo Bay, Cuba. The Court's decision on this Petition for a Writ of Certiorari may affect the basic human rights of both those persons named in this Petition as well as those who are not, but who are in the same intolerable conditions.

SUMMARY OF ARGUMENTS

The Court should find that United States government is bound by international law providing for the due process of the petitioners. This finding is justified by the rules of international human rights law of which the Court should take cognizance.

The rules of international human rights law protecting the Petitioners' human rights are customary international law. This law applies to all persons under the jurisdiction of the United States. This law requires that the United States government respect the human rights of due process, the prohibition of arbitrary detention, and the right to human treatment of persons it holds in Guantánamo Bay, Cuba. This law should be applied by the courts of the United States and by this Court in issuing Petitioners a Writ of Certiorari.

The issues of customary international human rights law presented in this case, the lower courts' decision not to address these issues, and Respondent's claim that international law is not relevant, are reasons in and of themselves for the Court to issue Petitioners the requested a Writ of Certiorari.

Finally, an additional reason for the Court to issue a Writ of Certiorari and review the remand the decision back to the lower court is provided by the very reason the government

puts forward for denying the Petitioners' human rights: the so-called 'war on terrorism'. If the United States is to convince other countries and individuals that it is a law abiding member of the international community it must apply the international law to which it and other countries have agreed. If the United States government flaunts the basic principles of international human rights law, it adds legitimacy to those who claim that they are entitled to use extra-legal means to achieve justice for their claims against the United States. This consequently undermines the rule of law.

I. THE COURT SHOULD FIND THAT THE UNITED STATES GOVERNMENT IS BOUND BY INTERNATIONAL HUMAN RIGHTS LAW

The Court should find that the government of the United States is bound by international customary law and therefore is legally obliged to ensure the international human rights of the prisoners in Guantanamo Bay, Cuba. Customary international law is part of United States law and it should be interpreted to apply to person under the jurisdiction of the United States regardless of where they are situated.

A. THE COURT SHOULD APPLY INTERNATIONAL HUMAN RIGHTS LAW

The Court has increasingly recognized the relevance of international law in the United States courts.[2] Justice Sandra

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[2] *See Grutter v. Lee Bollinger et al.*, 539 U.S. ___ (2003) (concurring opinion of Justice Ginsberg, joined by Justice Souter, stating that the

Day O'Connor has reflected the need to refer to international law stating that "understanding international law is no longer just a specialty. It is becoming a duty."[3]

The Court has long held that international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."[4] The *Restatement (Third) on the Foreign Relations Law of the United States*, compiled by some of America's leading international legal minds and intended to reflect the state of existing law, unambiguously states that "[i]nternational law and international agreements are the law of the United States" and that "[c]ourts of the United States are bound to give effect to international law...."[5] Furthermore, the *Restatement* also provides that the "determination or interpretation of international law or agreements is a

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Court's decision upholding affirmative action is consistent with international law, Slip Op. at p. 1); *Thompson v. Oklahoma*, 487 U. S. 815, 830 (1988); *Enmund v. Florida*, 458 U. S. 782, 796–797, n. 22 (1982); and *Trop v. Dulles*, 356 U. S. 86, 102– 103 (1958). *Cf. Atkins v. Virginia*, 536 U. S. ____ (2002) Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas joined, dissenting, Slip Op. at pp. 4 and 5. *Also See* Ruth Bader Ginsberg & Deborah Jones Merritt, *Affirmative action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 281-82 (1999).

[3] Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 353 (2002).

[4] *The Paquete Habana*, 175 U.S. 677, 700 (1900). *Also see Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 69-70 (1990); and Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999).

[5] American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (1987).

question of law and is appropriate for judicial notice in courts in the United States without pleading or proof."[6]

These statements are consistent with the very existence of customary international law and the basic principle that a state may not justify a violation of international law based on its domestic law.[7]

The Court has further held in *Murray v. Schooner Charming Betsy* that whenever possible domestic law must be interpreted in accordance with international law stating that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains."[8]

In the present case before the Court, it is not an act of Congress that requires interpretation in accordance with international law, but the exercise of Executive discretion in furtherance of a broad Congressional mandate. Such Executive discretion must be construed to be consistent with the law of nations as the Court stated in *Hartford Fire Ins. Co. v. California* when it is based on Congressional authority because "...customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe ... [and]

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[6] *Id.* at §113.

[7] *See* art. 27 of the Vienna Convention on the Law of Treaties, U.N.T.S., vol. 1155, p.331, *entered into force* 27 January 1980 (ratified by 93 states as of 24 October 2003).

[8] 2 CRANCH 64, 117-118 (1804). *Also see McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963) holding that for the Court "to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."" (*quoting Benz v. Compania Naviera Hidalgo, S. A.*, 353 U.S. 138, 146 -147 (1957).

... Congress is generally presumed not to have exceeded those customary international law limits...."[9]

The United States' practice of applying customary international law in its domestic courts and as part and parcel of its domestic law echoes the practice of a host of other countries.[10] This practice is, however, now threatened because the government claims that the Executive must act in drastic manners to fight a 'war on terrorism' that is of unlimited duration and against a largely unidentifiable enemy. Few other countries have taken as draconian measures as the United States has taken to combat terrorism.

This case comes at a time of additional urgency for the Court to take cognizance of and apply international law because this case raises important issues going to the very legitimacy of United States law and the United States as a law abiding member of the international community. If the United States is to convince other countries and individuals around the world that it is a law abiding member of the international community it must apply the international law that it and other countries have agreed to apply.

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[9] 509 U.S. 764 (1993). *Cf. Garcia-Mir v. Meese*, 622 F. SUPP. 887, 903-904 (N.D. Ga. 1985), *rev'd in part & aff'd in part & dismissed as moot in part* 788 F.2D.1446 (11th Cir), *cert. denied*, 479 U.S. 889 (1986).

[10] *See* Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, INTERNATIONAL LAW 154-157 (3rd ed. 1993) (citing Austria, France, Germany, Greece, and Italy as countries whose constitutions and practices explicitly accord customary international law the domestic status of law). *Also see Francis v. The Queen* [1956] S.C.R. 618, at p. 621 and *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R.141, at pp. 172-73 (both cases from Canada) and *Triquet v. Bath* (1746) 3 BURR 1478, 97 ER 936 (Court of Kings Bench), *West Rand Central Gold Mining Co. v. The King* [1905] 2 KB 391 (King's Bench Division), and *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529 (Court of Appeal) (all three from England).

If the United States government flaunts these most basic principles of international law, especially international human rights law, it adds legitimacy to those who claim that they are entitled to use extra-legal means to achieve justice for their claims against the United States.

This has become clear as independent polls indicate that individuals around the world are increasingly frustrated by the United States actions around the world.[11] Such frustration often turns into violence. Such was the case even at the time of our country's independence. It is precisely because of such frustrations about violations of the basic rights of individuals that the United States was formed and the American Revolution fought over two hundred years ago.[12] Now two centuries later, by failing to provide individuals their basic human rights, the United States government is acting inconsistent with its own foundational principles, undermining its own objective of fighting terrorism, and threatening the rule of law. In doing so the United States' action fuels the arguments of its enemies who argue that certain inalienable rights can no longer be secured by appeal to the rule of law.

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[11] *See* PEW Global Attitudes Project, VIEWS OF A CHANGING WORLD (June 2003) (concluding on the basis of several polls conducted in accordance with well-documented and accepted standards of social science research that "in most countries, opinions of the U.S. are markedly lower than they were a year ago. The war has widened the rift between Americans and Western Europeans, further inflamed the Muslim world, softened support for the war on terrorism, and significantly weakened global public support for the pillars of the post-World War II era – the U.N. and the North Atlantic alliance," *id.* at 1). This PEW project is chaired by former United States Secretary of State Madeleine K. Albright.

[12] American Declaration of Independence, unanimous declaration of the thirteen United States of America, July 4, 1776.

Because of the danger inherent in the failure to recognize the most basic human rights of individuals as legally enforceable rights as the United States government seeks to do, this case raises an issue of substantial consequence for the rule of law in the United States. At the same time, it provides the Court an opportunity to reaffirm the United States' commitment to respecting these most basic rights by ensuring the application of international human rights law.

B. THIS LAW IS CUSTOMARY INTERNATIONAL LAW

The American Law Institute's Restatement of the Foreign Relations Law of the United States described "Customary International Law of Human Rights" stating that "[a] state violates international law if, as a matter of state policy, it practices, encourages or condones ... (d) torture or other cruel inhuman, or degrading treatment or punishment, ... (e) prolonged arbitrary detention, ... (g) a consistent pattern of gross violations of internationally recognized human rights."[13] The Restatement further states that "[t]he customary law of human rights is part of the law of the United States to be applied as such by States as well as federal courts."[14]

Petitioners claim that they have been arbitrarily arrested or detained; denied the right to be informed, at the time of arrest, of the reasons for their arrest and any charges against them; denied the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power and a trial within a reasonable time or their release; denied the right to take proceedings before a court, in order that that

[13] RESTATEMENT, *supra* note 5, § 702.
[14] *Id.* at Comment c.

court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful; and denied the right to compensation if they have been the victims of unlawful arrest or detention. In addition, Petitioners claim that have been denied the right to counsel and may be treated inhumanly. Each of these claims implicate a human right that is protected by customary international law.

International human rights include the most basic protections of the individual. Among these rights are the right to life, the right to humane treatment or the prohibition of torture, cruel, inhuman or degrading treatment and due process rights such as the right to counsel, to be informed of charges in a timely manner, to be brought before a judge with the ability to challenge one's detention. These rights are enshrined in customary international human rights law that is among other places evidenced by treaties ratified by a large number of state including the United States.[15]

Foremost among the treaties evidencing this customary international law is the Charter of the United Nations, which according to its article 103, is supreme over all other treaties. The United States and 190 other states in the international community have ratified this treaty. The United Nations is an international organization which the United States played a prominent role in forming and of which the United States is a member state. Article 1 of this treaty states that a purpose of the United Nations is the promotion and respect for human rights. Article 56 expressly states that all member

[15] *See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Judgment on the Merits), 1986 I.C.J. REPORTS 14 at para. 183; *Continental Shelf (Libya Arab Jamahiriya v. Malta)*, 1985 I.C.J. REPORTS pp. 29-30 at para. 27. *Also see* Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (5th ed. 1998).

states "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55," which includes "universal respect for, and observance of, human rights and fundamental freedoms for all...."

Although the Charter of the United Nations does not elaborate in more detail on what human rights include the international community acting under the auspices of the United Nations and numerous regional international organizations has elaborated in great detail and with significant precision what is included as international human rights law. (*See* Argument II, *infra*. at p. 16).

International human rights law has been defined by a multitude of treaties in which states have agreed both to abide by obligations expressed in writing and to allow designated international bodies the authority to interpret these treaties. Human rights treaties providing for the rights claimed by Petitioners in this case have been ratified by the overwhelming majority of countries. The treaties include the International Covenant on Civil and Political Rights,[16] which has been ratified by 144 countries including the United

[16] U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976. At the time of ratification the United States entered reservations asserting that it is not self-executing and therefore cannot be applied directly by the United States courts. *See* Resolution of Ratification, U.S. Senate, 102nd Congress, 2nd Session Exec. Rept. 102-23 (March 24, 1992 [Legislative Day January 30, 1992]) section II (5), p. 23. This reservation has in turn been objected to by numerous states as invalid. *See* RESERVATIONS, DECLARATIONS, NOTIFICATIONS AND OBJECTIONS RELATING TO THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/2/Rev.4 at 47 *et al* (August 24, 1994). Regardless of one's opinion on the validity of the United States' Reservations they do not pertain to the substantive obligations in the treaty which remain fully valid.

States; the Charter of the Organization of American States,[17] which has been ratified by 35 countries, including the United States; the American Convention on Human Rights,[18] which has been ratified by 25 countries; the African Charter on Human and Peoples' Rights,[19] which has been ratified by 52 countries; the European Convention for the Protection of Human Rights and Fundamental Freedoms,[20] which has been ratified by 44 countries; and the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States,[21] which has been ratified by 12 countries. In total 134 countries have ratified the regional treaties and 144 countries have ratified the United Nations Covenant, among them almost all of the United States' allies in the 'war on terrorism'. Many of these states have also agreed to allow multiple international human rights bodies review their country's actions.

Together these treaties provide amble evidence of the existence of customary international human rights law providing for the rights of due process, protection from arbitrary detention, and protection from inhumane and degrading treatment.

[17] OAS Treaty Series, Nos. 1-C and 61, U.N.T.S., No. 1609, Vol. 119, *entered into force* April, 30 1948.
[18] *Signed 22 November* 1969, *entered into force* 18 July 1978, OAS Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979).
[19] *Adopted* 27 June 1981, *entered into force* 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 Rev.5.
[20] 213 U.N.T.S. 221, *signed* 4 November 1950, *entered into force* 3 February 1953.
[21] Council of Europe doc. H(95)7 rev (1995).

C. THIS LAW APPLIES TO ALL PERSONS UNDER THE JURISDICTION OF THE UNITED STATES

All major the international human rights treaties state that human rights protected therein apply to all individuals under the jurisdiction of the state regardless of whether or not an individual is situated within the territory of the state.[22] Moreover, as discussed in more detail below all major the regional international human rights tribunals have held that international human rights law which is binding on a state either by a treaty or because it has become customary international law is applicable to the acts attributable to states but occurring outside a state's borders.[23]

The Inter-American Commission on Human Rights has held that a state may be responsible "for acts and omissions of its agents which produce effects or are undertaken outside that state's own territory"[24] and that "when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation

[22] *See* art. 2 of the ICCPR, art. 1 of the ACHR, art. 1 of the ECHR, art. 1 of the CHRCIS, and art. 1 ACHPR.

[23] The general international law of state responsibility also makes a state responsible for any act that is attributable to a state and violates an international obligation no matter where the harm occurs. *See* International Law Commission, Draft articles on the Responsibility of States for Internationally Wrongful Acts, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, U.N. GAOR, 56th Sess. Supp. No. 10 (A/56/10), chp.IV.E.1 (2001) at art. 2.

[24] *Victor Saldaño v. Argentina*, U.N. Hum.R.Comm., Report No. 38/99 (11 March 1999) at para. 17.

to respect human rights continues...."[25] In its decision concerning the use of force by Cuba against two aircraft flying well outside of Cuban airspace, the Inter-American Commission held that

> [t]he fact that the events took place outside of Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because ... when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues—in this case the rights enshrined in the American Declaration.[26]

The present case involves actions by United States soldiers acting under the command of the United States government. Consequently, any individual affected by their action is under the jurisdiction of the United States for purposes of application of the relevant international human rights law.

Concerning these same Petitioners, in its decision adopting precautionary measures concerning the "Detainees in Guantanamo Bay, Cuba" the Commission unambiguously stated that the detainees in Guantanamo Bay who were apprehended in connection with the United States military action in Afghanistan "remain wholly within the authority

[25] *Armando Alejandro, Jr., Carlos Costa, Mario de la Peña and Pablo Morales v. Cuba*, Case No. 11,589 Report No. 86/99 (29 September 1999) and Case No. 10,675, Report No. 51/96, Decisions of the Commission as to the Merits (13 March 1997) (holding that the American Declaration creates obligations for the United States government as concerns persons outside of United States territory, including in Guantanamo Bay where the current Petitioners are being held).

[26] *Id.*

and control of the United States government. [footnote omitted]"[27]

Both the United Nations Human Rights Committee and the European Court of Human Rights have confirmed this same rationale.[28] The European Court of Human Rights in the case *Loizidou v. Turkey*[29] stated that:

> The responsibility of a Contracting Party may also arise when as a consequence of military action--whether lawful or unlawful--it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the [ECHR] derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[30]

[27] *Decision on Request for Precautionary Measures (Detainees in Guantánamo Bay, Cuba)*, Inter-Am.C.H.R. (Mar. 13, 2002), *reprinted in* 41 I.L.M. 532, 533 (2002).

[28] *See Mutombo v. Switzerland*, Committee on Torture, Comm. No. 13/1993, UN Doc. A/49/4 at 45 (1994); *Celiberti de Casariego v. Uruguay*, U.N. Hum. Rigts. Comm., Comm. No. R 13/56 (1981), *reprinted in* 2 H.R.L.J. 145 (1981) and 68 I.L.R. 41 (1984); *Soering v. the United Kingdom*, European Court of Human Rights, Judgment of 7 July 1989, Ser. A, No. 161, pp. 35–36, §§ 90–91; *Vilvarajah and Others v. the United Kingdom*, European Court of Human Rights, Judgment of 30 October 1991, Ser. A, No. 215, p. 36, §§ 107–08; and *Chahal v. the United Kingdom*, European Court of Human Rights, Judgment of 15 November 1996, REPORTS OF JUDGMENTS AND DECISIONS 1996-V, p. 1859, §§95–97.

[29] *Loizidou v. Turkey* (Preliminary Objections) (1995), 20 *E.H.R.R.* 99. *Also see Cyprus* v. *Turkey* (1976) 15 E.H.R.R. 509; *Celiberti de Casariego*, *supra* note 27, 68 I.L.R. 41 at para. 10.3; *Saldias de Lopez* v. *Uruguay* (1985), Communication No. 52/1979, UN Doc. CCPR/C/OP/1 (views adopted 29 July 1981).

The Human Rights Committee, charged with applying the International Covenant of Civil and Political Rights, has similarly held several times that it is not where the violation occurs but "the relationship between the individual and the State in relation to a violation of any of the rights set forth" that is important.[31]

This rationale for jurisdiction *ratione loci* has also been supported by highly qualified publicists who have stated that "[i]t is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation which engages the possible responsibility of the State and not the place where the action takes place"[32] and "[w]here agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues."[33]

Finally, the International Court of Justice has held the United States responsible for its actions abroad that effected the basic human rights of individual overseas.[34]

[30] *Loizidou*, *supra* note 29, at 101. *See also McCann and Others v. United Kingdom*, 21 *E.H.R.R.* 97 (1995); *Celiberti De Casariego*, *supra* note 27, at para. 10.3 (1984), and *Saldias de Lopez*, *supra* note 29, at paras. 12.1-12.3.

[31] *Saldias de Lopez*, *supra* note 29, at para. 12.2.

[32] Françoise Hampson, *Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts*, 31 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 119, 122 (1992).

[33] Theodore Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 A.J. I.L. 78, 81 (1995).

[34] *See Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 15.

II. THERE IS RELEVANT CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW TO THAT COULD HAVE BEEN AND SHOULD HAVE APPLIED BY THE COURTS

Customary international human rights law establishes clearly definable human rights for Petitioners.

First, the Charter of the United Nations creates an affirmative obligation on states to ensure the protection of human rights in article 1, 55 and 56. As the United States Court of Appeal stated in *Filartigua v. Peña-Irala* "[t]he United Nations Charter (a treaty of the United States, see 59 Stat. 1033 (1945)) makes it clear that in his modern age a state's treatment of its own citizens is a matter of international concern."[35] The binding nature of the Charter's obligations is not subject to doubt, both as treaty law and as reflecting customary international law.[36] Furthermore, the determination of the particulars of the human rights obligations emanating from the Charter is possible because of the detail with which the rights have been stated in human rights treaties and the detailed interpretation that has been given to the rights by authorized international human rights bodies.

The human rights claimed by Petitioners are established under customary international as evidenced by the overwhelming number of countries that have ratified the treaties in which these rights are found and their subsequent

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[35] 630 F.2D. 876 (2d Cir. C.A.1980).
[36] *See, supra* note 15, para. 176

respect for these rights.[37] Together treaties containing these rights have been ratified by every country in the international community. In total these countries have professed almost 500 times, by the solemn act of ratifying legal binding treaties and agreeing to numerous declarations,[38] their adherence to the human rights which are claimed by the Petitioners.

In the various instruments the human rights claimed by Petitioners and which are violated by the United States fall into the categories of four general rights: (1) general human rights of due process: equality before the law and fair trial; (2) specific human rights of due process the right to be informed of the charges against oneself, the right to be brought before a court within a reasonable time, and the right to legal representation; (3) the prohibition of arbitrary arrest or detention; and (4) the prohibition of inhumane and degrading treatment.

(1) General human rights of due process: equality before the law and fair trial

The right to equality of law and general right to a fair trial is provided for in artt. 7, 8 and 10 of the UDHR, art. 14

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[37] *See, supra* at pp. 9 and 10. *Also see* Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 *U.S.T.* 3316, 75 *U.N.T.S.* 135, *entered into force* 21 October 1950 (ratified by 188 countries).
[38] *See, for example*, Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) and American Declaration of the Rights and Duties of Man, O.A.S. Res. XX, *adopted* by the Ninth International Conference of American States (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

of the ICCPR, artt. II, XVII, and XXVI of the ADRDM, art. 8 of the ACHR, artt. 6 and 13 of the ECHR, artt. 3 and 7 of the ACHPR and artt. 5 and 6 of the CHRCIS. In each case the basic provision of fair trial includes access to a court of law to have one rights determined, particularly where criminal charges might be relevant and the right of all individual to be treated similarly before the courts.

(2) Specific human rights of due process: the right to be informed of the charges against oneself, the right to be brought before a court within a reasonable time, and the right to legal representation

The right to be informed of the charges against oneself is provided for in art. 14(3)(a)of the ICCPR, art. 8 (2)(b) of the ACHR, art. 6(3)(a) of the ECHR, and art. 5(2) of the CHRCIS.

The right to be brought before a court within a reasonable time is provided for in art. 14(3)(c) of the ICCPR, art. XXV of the ADRDM, art. 8(1) of the ACHR, art. 6(1) of the ECHR, art. 7(1)(d) of the ACHPR, and art. 6(1) of the CHRCIS.

The right to legal representation is provided for in art. 14(3)(a) of the ICCPR, art. 8(2)(d) and (e) of the ACHR, art. 6(3)(c)of the ECHR, art. 7(1)(c) of the ACHPR and art. 6(3)(c) of the CHRCIS. In all cases this last right is reserved for criminal procedures.

(3) The prohibition of arbitrary arrest or detention

The prohibition of arrest or detention is found in art. 9 of the UDHR, art. 9 of the ICCPR, art. XXV off the ADRDM, art. 7 of the ACHR, art. 5 of the ECHR, art. 6 of the ACHPR and art. 5 of the CHRCIS. In each case the prohibition is

stated in general terms, however, it always includes at least the right of individuals to have access to a court for the determination of the *prima facie* validity of their detention.[39]

(4) The prohibition of cruel, inhumane and degrading treatment

The prohibition of inhumane and degrading treatment is found in art. 5 of the UDHR, artt. 7 and 10 of the ICCPR, art. XXV of the ADRDM, art. 5 of the ACHR, art. 3 of the ECHR, art. 5 of the ACHPR and art. 3 of the CHRCIS. This right has been interpreted to prohibit deprivations and treatment similar to that which the prisoners in Guantánamo Bay, Cuba have been reportedly exposed. In the leading case of *Ireland v. United Kingdom*[40] the European Court of Human Rights held that the five techniques employed by the British government against suspected terrorists in detention constituted inhumane treatment. The five techniques included 1. keeping detainees hooded for extensive periods of time; 2. making detainees remain in a stressful position for long periods of time; 3. accommodating the detainees under conditions where they were subject to continuous and monotonous noise; 4. depriving the detainees of sleep; and 5. restricting detainees diet.

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This basic catelogue of human rights as they are expressed in widely accepted human rights treaties and

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[39] *See* Rhona K.M. Smith, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 243-245 (2003).

[40] *Judgments of the European Court of Human Rights*, Ser. A, No. 25 (18 January 1978).

declarstions indicates that international customary human rights law is definable and therefore could and should have been applied by the lower courts. Each of the human rights described above has been further defined in extensive detail by authorized regional and United Nations international human rights bodies, sometimes with specific reference to the 'war on terorrism'.[41] When so many carefully negotiated and painfully merticulous expressions of international human rights law exist they should be applied by the United States courts.

CONCLUSION

Petitioners seek respect for their most basic human rights that are protected under international human rights law. The United States Constitution customary and international human rights law require that these rights be respected. The Petitioners' request for a writ of certiorari should therefore be granted, the contrary judgment of the United States Court of Appeals for the District of Columbia should be reversed, and the case should be remanded for further proceedings.

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[41] *See* United Nations Office of the High Commissioner for Human Rights. *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (in publication, 2003) *accessed at* http://www.unhchr.ch/html/menu6/2/digest.doc (28 September 2003) (surveying some of the decisions of numerous international human rights bodies related to situations involving terrorism).

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